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No. 77-851

In the Supreme Court of the United States

OCTOBER TERM, 1977

MANUEL LOUIS FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
BENJAMIN R. CIVILETTI,
Assistant Attorney General,
SIDNEY M. GLAZER,
KATHLEEN A. FELTON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is reported at 556 F. 2d 1246.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1977. The petition for a writ of certiorari was filed on November 21, 1977 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's motion for disclosure of a confidential informant's identity was properly denied.

2. Whether a package of cocaine that petitioner had thrown out of a vehicle should have been suppressed as evidence.

STATEMENT

Petitioner was charged in an indictment filed in the United States District Court for the Southern District of Florida with possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841 (a)(1). He pleaded *nolo contendere* pursuant to an agreement with the government that he would have a right to appeal the denial of his pretrial motions to suppress evidence and to disclose the identity of a government informant. He was sentenced to a two-year term of imprisonment, to be followed by a three-year special parole term. The court of appeals, although expressing disapproval of plea agreements purporting to preserve non-jurisdictional issues for appeal, affirmed on the merits (Pet. App. 1–2).

The evidence at the hearing on petitioner's pretrial motions showed that the residence of one Pablo Cairo had been under surveillance by agents of the Drug Enforcement Administration (DEA) on May 7, 8, and 9, 1976 (Tr. 41). A confidential informant was assisting the DEA in its investigation and was inside the residence on the evening of May 8. This informant had been introduced to the DEA agents by an officer of the Miami Police Department and was represented

as having provided reliable information in the past which had led to arrests for drug-related crimes (Tr. 66). Petitioner's jeep, which had been seen parked at the house on the 7th, was also seen there on the night of May 8th (Tr. 43). In the course of the evening, the federal agents observed various persons enter and leave the house (Tr. 41).

At approximately 1:00 a.m. on May 9, the informant left the house and told the DEA agents that a delivery of cocaine had just been made to the Cairo residence and that petitioner and another person, Dan Guzewich, would be leaving shortly to deliver it to customers at a nearby motel. He stated that the two people would take separate cars, that one would be the jeep, and that both persons would be armed (Tr. 45–46). Shortly thereafter, the agents observed Guzewich leave the house and retrieve an object which appeared to be a firearm from a car parked in the driveway. At 6:30 a.m. the agents observed a person who appeared to be petitioner, according to the description given them by the informant, leave the house, get into the jeep, and drive away (Tr. 48–51).

The DEA agents followed in three cars, and as the jeep entered the access road to an expressway, two of the government cars drove up on either side of petitioner's vehicle, while the agent driving the third car turned on a light attached to the roof of his car. Petitioner initially slowed down, then abruptly made a U-turn hitting one of the DEA vehicles, and proceeded back the wrong way on the access road (Tr. 51–54).

The agents continued their pursuit as petitioner travelled at speeds up to 70 miles an hour. At one point,

petitioner threw a transparent plastic bag containing white powder from his vehicle (Tr. 55–58). The chase ended about 200 feet farther on, after petitioner's vehicle struck a parked car and then collided with one of the government cars. The agents retrieved the bag, and on subsequent examination it was found to contain nearly half a kilogram of cocaine (Tr. 59–60, 100–101).

ARGUMENT

1. Petitioner contends (Pet. 13–21) that the district court erred in denying his pre-trial motion for disclosure of the identity of the government's confidential informant. Relying on *Roviaro* v. *United States,* 353 U.S. 53, petitioner claims that the identity of the informant was essential to his defense that the informant gave him the package of cocaine and told him it was a quantity of money which was to be delivered to a friend (Tr. 28). Petitioner claimed that the informant was the only other available witness to this conversation, although he admitted that both the informant and Cairo had actually given him the package (Tr. 30). That claim is insubstantial.

Petitioner recognizes (Pet. 14) that he has no absolute right to disclosure of the informant's identity. Rather, *Roviaro* establishes (353 U.S. at 62) that

> no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case,

> taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

The circumstances of this case support the denial of petitioner's motion to disclose. Petitioner made no convincing showing of his need to know the informant's identity. First, his claim that he thought that the transparent plastic bag contained money rather than cocaine powder, and that the informant might substantiate that claim, is inherently incredible and completely at odds with his flight from the agents and his abandonment of the bag. Second, unlike *Roviaro,* the informant was not the only witness to the transaction in question; according to petitioner's own version of events, both the informant and Cairo had asked him to deliver the alleged money, and the record reveals that petitioner's attempts to locate Cairo, with whom petitioner was fairly well acquainted, were at best half-hearted (Tr. 36–38, 64, 87).

Petitioner's further contention (Pet. 16) that the identity of the informant was necessary to enable him to establish the agents' lack of probable cause for arresting him is answered by *McCray* v. *Illinois,* 386 U.S. 300, in which, on similar facts, the Court held that the prosecution need not disclose the identity of the informant who supplied the requisite probable cause, so long as the agents who acted on the information were available to testify at the suppression hearing.[1]

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[1] There is no merit to petitioner's further contention (Pet. 19–21) that failure to disclose the informant's identity violated

2. Petitioner also argues (Pet. 22–27) that the evidence against him, the package of cocaine, should have been suppressed. Petitioner claims that he was arrested when the agents first surrounded his car, that there was no probable cause for the arrest because there was insufficient basis for the agents to believe that the informant was reliable, and that the cocaine should be suppressed. Those claims are unfounded.

First, petitioner errs in assuming that the agents required probable cause in order to continue their investigation by stopping petitioner's automobile. Such a stop may be made, consistent with the reasonableness requirement of the Fourth Amendment, on the basis of a founded suspicion of criminal activity (see *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 879–880), and there can be no question that the information known to the agents at the time they attempted to stop petitioner's vehicle was ample to satisfy that requirement. Petitioner's subsequent high-speed flight served only to confirm their information and to provide ample probable cause for the ultimate arrest even if it was lacking initially.

Second, even if the initial attempt to stop were deemed an arrest, the agents had probable cause. The

Brady v. *Maryland*, 373 U.S. 83. There is no support in the record for petitioner's bare assertion that the informant possessed exculpatory information and that the prosecution knew it. Mere speculation as to the possible existence of exculpatory information in the government's possession does not establish a *Brady* violation or entitle a defendant to wholesale disclosure of information in the government's possession. *United States* v. *Davis*, 487 F. 2d 1249, 1250–1251 (C.A. 5); *United States* v. *Gonzalez*, 466 F. 2d 1286, 1288 (C.A. 5). Moreover, as noted, petitioner's alleged defense is plainly contrary to the evidence.

facts here are considerably stronger than those in *Draper* v. *United States,* 358 U.S. 307, where an arrest based on information supplied by an informant was upheld. Here, as in *Draper,* the agents had reason to believe that the informant had provided reliable information in the past. But here, unlike *Draper,* the agents also knew the basis for the informant's information—namely, his presence in the house with petitioner and his confederates when a supply of cocaine arrived.

Moreover, as in *Draper,* the agents in this case were able to verify much of the information given them. On May 7, the informant gave the agents a description of petitioner's vehicle, and they observed that vehicle parked at the Cairo residence both on the 7th and 8th of May. He said that petitioner and Dan Guzewich would be leaving with the cocaine, and that they would be armed. The agents later observed Guzewich leave the house and take what appeared to be a gun from his car. And at 6:30 a.m. they saw a person matching the informant's description of petitioner leave the house and drive off in the jeep, just as they had been told. At that point, the agents were justified in relying on the information they knew to be based on their informant's personal observations to conclude that illegal activity was quite probably taking place.

Petitioner's reliance on *Beck* v. *Ohio*, 379 U.S. 89, is misplaced, since the facts in that case were substantially different. In *Beck*, the officer testified only that he had some vague "information" concerning the defendant and could not even specify the source of those reports. He had no information indicating that

he would be able to find the defendant at the particular place where he arrested him, nor could the officer point to any specific reason for believing that at the time of the arrest defendant had acted or was acting unlawfully. See 379 U.S. at 93–94.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BENJAMIN R. CIVILETTI,
Assistant Attorney General.
SIDNEY M. GLAZER,
KATHLEEN A. FELTON,
Attorneys.

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[2] In any event, it is questionable whether the seizure of the cocaine, which petitioner threw from his car during the chase, should be considered the "fruit" of any stop or arrest within the meaning of the exclusionary rule. A person has no Fourth Amendment rights with respect to the seizure of property that he has abandoned. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 241. A criminal's decision to jettison contraband during a chase in order to prevent its discovery may be a "fruit" of the attempted stop in a strictly "but for" sense, but it is also the product of an intervening act (his own decision) that might be viewed as a break in the causal chain (see *Brown* v. *Illinois*, 422 U.S. 590); it is difficult to see what deterrence purposes would be served by extending the exclusionary rule to such "fruits". There is, however, no occasion to reach this issue on the facts of the present case.

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